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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.

No. 73-795

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The *en banc* opinion of the court of appeals (*Florida Power* Pet. App. A, pp. 3-75)[1] is reported at 487

[1] The opinion covers two cases which were consolidated for purposes of argument and decision—*International Brotherhood of Electrical Workers, AFL-CIO, et al.* v. *National Labor Rela-*

F. 2d 1143. The decisions and orders of the National Labor Relations Board (*Florida Power* Pet. App. B, pp. 77–102, and A. 162–194) are reported at 193 NLRB 30, and 192 NLRB 85, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973 (*Florida Power* Pet. App. A, pp. 1-2). The petition for a writ of certiorari in No. 73-556 was filed on September 27, 1973, and the petition in No. 73–795 was filed on November 16, 1973. The petitions were granted on January 21, 1974 (A. 80, 81). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Section 2. When used in this Act—
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> * * * * *
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> (3) The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.
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> * * * * *
>
> (11) The term "supervisor" means any individual having authority, in the interest of the

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tions Board, C.A. No. 71–1559 (hereafter *Illinois Bell*), and *International Brotherhood of Electrical Workers, Local 641, et al. v. National Labor Relations Board, et al.*, C.A. No. 71-1712 (hereafter *Florida Power*).

"*Florida Power* Pet. App." refers to the Appendix to the petition for certiorari in *Florida Power*, No. 73–556. "A." refers to the separate two-volume appendix to the briefs.

employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

Section 14.

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining super-

visor-members for crossing a picket line and performing rank-and-file work during an economic strike against the employer.[2]

STATEMENT

A. THE BOARD'S DECISIONS

1. "ILLINOIS BELL."

For many years, Local 134, International Brotherhood of Electrical Workers, AFL–CIO ("Local 134") has been recognized by the Illinois Bell Telephone Company ("Illinois Bell") as the bargaining representative, not only for rank-and-file employees, but also for certain supervisors working at its Chicago, Illinois "Plant Department" (A. 163; 202–203). Under the union security clause of the collective bargaining agreement, all members of this bargaining unit—including "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen"—must become and remain members in good standing of Local 134 (A. 163; 118).[3]

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[2] The same issue is presented in *Local 2150, International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, No. 73–877, *California Newspapers, Inc.* v. *San Francisco Typographical Union No. 21*, No. 73–1024, and *National Labor Relations Board* v. *San Francisco Typographical Union No. 21*, No. 73–1199, all pending on petitions for certiorari.

[3] However, this clause—as it appeared in Article III of the 1966–69 agreement and in all prior agreements going back to 1948—also provided (Article III, Section 3) that an employee will be "deemed a member in good standing so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues for the remainder of the term of this Agreement * * *" (A. 163; 118).

Since 1959, the wage provisions of the collective bargaining agreements have not covered these supervisors, but the provisions concerning such matters as vacations and overtime work have applied to them (A. 177; 120, 244, 147, 257–258). Other higher ranking supervisors—including those in the positions of District Installation Superintendent, Plant Assignment Foreman, and Test Center Foreman—have not been included in the bargaining unit for any purposes and, accordingly, have received no benefits under the collective bargaining agreement (A. 177; 113, 117, 120–37, 147, 257–258). Illinois Bell, however, has permitted the latter supervisors to maintain their union membership (A. 113, 467, 90, 215).[4] Both the supervisors within the bargain-

[4] In 1954, when the position of District Installation Superintendent was first created, Illinois Bell and Local 134 signed a letter of understanding, apparently still in force, providing (A. 113):

PROMOTIONS

I. All present P.B.X. General Foremen will be promoted to District Installation Superintendents reporting to the District Plant Superintendent in the Plant District to which they are assigned. All present Building Cable General Foremen will be promoted to District Construction Supervisors reporting to the Division Construction Superintendent to whom they are assigned.

(A) As District Installation Superintendents and District Construction Supervisors their wages and conditions of employment will not be a matter of union-management negotiations but they will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. However,

ing unit and those without who have maintained union membership are eligible to participate in the Pension Benefit Fund and Death Benefit Fund established by the International Brotherhood of Electrical Workers, AFL–CIO ("IBEW"), and to be covered under the group life insurance policy carried by Local 134 (A. 113, 264).

All of the aforementioned supervisory personnel are supervisors within the meaning of Section 2(11) of the Act, and they possess the authority to represent management in adjusting grievances (A. 179–180; 233–238, 246–247, 275–276).

Between May 8 and September 20, 1968, Local 134 engaged in an economic strike against Illinois Bell (A. 164; 91, 215). Illinois Bell informed its supervisory personnel that it would like them to work, but that the decision whether to do so would be left to each supervisor. Those who refrained from working would not be penalized (A. 164; 259–260, 265–266, 272). Local 134, however, warned its supervisor members that they would be subject to discipline if they performed rank-and-file work [5] during the strike (A. 164; 267–268, 270).

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any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personel.

[5] Rank-and-file work is work ordinarily performed by non-supervisory employees.

During the strike, some supervisors (both within and outside the bargaining unit) crossed the union's picket line and performed rank-and-file work, while others stayed away from the plant (A. 164; 260, 263, 288). After the strike, Local 134 imposed fines of $500 upon each supervisor-member who had performed rank-and-file work during the strike (A. 165; 97–98, 215, 262).[6] Most of the fined supervisors appealed to the IBEW, which, except where there was procedural irregularity, sustained the fines (A. 165; 91–93, 218).

Upon charges filed by the Bell Supervisors Protective Association (see *supra,* n. 6), the Board (Member Fanning dissenting) held that Local 134 and the IBEW, in so disciplining supervisor-members, violated Section 8(b)(1)(B) of the Act. The Board followed its decision in *Local 2150, IBEW* (*Wisconsin Electric Power Co.*), 192 NLRB 77 (A. 195–201)[7] issued the same day, where it stated (A. 199–200):

> During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus,

[6] Local 134 also imposed fines of $1,000 upon each of five supervisors who had formed an association (Bell Supervisors Protective Association) to obtain counsel for and otherwise protect those supervisors who worked during the strike (A. 165; 99, 262).

[7] This decision was enforced by the Seventh Circuit. *National Labor Relations Board* v. *Local 2150, International Brotherhood of Electrical Workers*, 486 F. 2d 602 (*Florida Power* Pet. App. D, pp. 105–117), pending on petition for certiorari, No. 73-877.

> the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.
>
> * * * The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. * * *

The Board ordered the unions, *inter alia,* to rescind the fines against the supervisors, to expunge all records of the fines, and to reimburse the supervisors for any portions of the fines paid (A. 167–168).

2. "FLORIDA POWER"

Since 1953, the Florida Power & Light Company ("Florida Power") has had a collective bargaining agreement with certain local unions of the IBEW which negotiate with Florida Power through the locals' association, Systems Council U–4[8] (*Florida*

[8] System Council U–4 was named as a respondent in the complaint, but the Board dismissed all charges against it and entered its order only against the local unions (*Florida Power* Pet. App. B, p. 83).

Power Pet. App. B, pp. 79–80; A. 10, 28, 45). The collective bargaining agreement, which does not require union membership, covers some low ranking supervisors.[9] None of the higher ranking supervisors involved in this case,[10] however, was a member of the bargaining unit covered by the agreement (A. 11–14, 28, 46, 53–57, 59, 61a–61d).[11]

Although not in the bargaining unit, the latter supervisors were permitted to maintain membership in the local unions. Many of them did, while a few

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[9] With respect to supervisors, the collective bargaining agreement provides (A. 47):

> * * * It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification * * *.

[10] These included those in the positions of District Supervisor, Assistant District Supervisor, Assistant Supervisor, Plant Superintendent, Plant Supervisor, Assistant Plant Superintendent, Distribution Assistant, Results Assistant, Assistant Plant Engineer, and Subsection Supervisor (*Florida Power* Pet. App. A, pp. 6–7).

[11] As the parties stipulated, charges were not filed regarding union discipline of any supervisors within the bargaining unit (A. 41–42). In its brief to the Board, Florida Power requested the Board to amend the complaint so as to include, *inter alia*, the unions' discipline of those unit supervisors. The Board declined to do so, on the ground that such amendment would go beyond the stipulation of the parties (*Florida Power* Pet. App. B, p. 81, n. 1).

held honorary withdrawal cards from their respective locals. (A. 39–40). The withdrawal cards entitled the supervisors, so long as they remained in good standing, to rejoin the locals at any time without paying an initiation fee and to apply for IBEW pension benefits (A. 41, 71–74). In addition, the cards entitled them to continue payments to the System Council U–4 Death Benefit Fund; some supervisors availed themselves of this opportunity (A. 16, 28, 39–41, 67).

All of the supervisors involved herein were "supervisors" within the meaning of Section 2(11) of the Act. They were authorized by Florida Power to represent it in matters involving interpretation of the collective bargaining agreement, and to adjust grievances (A. 14–15, 28, 38–39). Three of the supervisors, however, adjusted grievances of only non-bargaining unit personnel (A. 39).

Between October 22 and December 28, 1969, the local unions engaged in an economic strike against Florida Power. Both unit and non-unit supervisors crossed the picket lines and performed work, including some work normally performed by rank-and-file unit employees. (*Florida Power* Pet. App. B, pp. 79-80; A. 15, 28.) After the strike, five of the local unions disciplined those supervisor-members who had performed rank-and-file work during the strike, fining them in amounts ranging up to $6,000. Many of them were also expelled from membership in their respective locals and in the System Council U–4 Death Benefit Fund. Those who were expelled lost their good standing with the locals and, accordingly, could not

qualify for IBEW pension benefits. (*Florida Power* Pet. App. B, p. 81; A. 16, 28, 29–38).

Upon charges filed by Florida Power, the Board (Member Fanning dissenting), relying upon its two prior decisions in *Illinois Bell* and *Wisconsin Electric, supra,* held that the five locals violated Section 8(b)(1)(B) of the Act by disciplining supervisors "for performing struck work" (*Florida Power* Pet. App. B, pp. 82–83). The Board ordered the locals, *inter alia,* to rescind and refund all fines, to expunge all records of the disciplinary proceedings involving the fined supervisors, and to restore those persons to full membership in the union and the Death Benefit Fund (*id.* at 85–88).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a 5 to 4 *en banc* decision,[12] concluded that "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work" (*Florida Power,* Pet. App. A, p. 52). The majority was of the view that Section 8(b)(1)(B) went no further than to proscribe union attempts to discipline supervisors for the manner in which they performed their management functions, and that there was little likelihood that discipline of supervisors for performing rank-and-file struck work would significantly affect the performance of those functions. The majority reasoned that

[12] The *en banc* decision replaced an earlier panel decision in *Illinois Bell, 81 LRRM* 2257 (*Florida Power* Pet. App. F. pp. 123–179).

"when a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of non-supervisory employees, he is no longer acting as a management representative * * *. [T]he supervisors will not be serving two masters at the same time. They will be serving them at different times" (*Florida Power* Pet. App. A, pp. 24–25; internal quotation marks omitted).

The dissenters stated, *inter alia,* that the majority (1) was "unrealistic" in asserting that the supervisors' performance of rank-and-file work during a strike was "totally unrelated" to the collective bargaining process and their responsibilities in it, and (2) was unwarranted in reversing the Board's determination that the unions' imposition of sanctions on the supervisors would adversely affect their loyalty to their employers regardless of the type of work they performed during a strike (*Florida Power* Pet. App. A, pp. 60–63).

SUMMARY OF ARGUMENT

I

A. Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In *San Francisco-Oakland Mailers' Union No. 18,* 172 NLRB 2173, the Board held that this provision barred not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance

adjustment representative, but also union discipline of a supervisor-member with collective bargaining or grievance adjustment responsibilities for the manner in which he performed those duties. For, such discipline would tend to make the disciplined supervisor "subservient" to the union's will and, hence, less loyal to the employer in any future decisions relating to collective bargaining or grievance adjustment. As a result, the employer would have to replace that supervisor "or face *de facto* nonrepresentation" by him (*id.* at 2173). In later cases, the Board extended this principle to cover situations where the union discipline was imposed on a supervisor with grievance adjustment and collective bargaining functions for the manner in which he performed his other lawful supervisory or management functions. The Board's holding in the present cases that Section 8(b)(1)(B) bars union discipline of such a supervisor-member for performing rank-and-file work during a strike constitutes a reasonable and logical extension of the earlier Board decisions.

B. The Board's construction of Section 8(b)(1)(B) harmonizes that provision with the other provisions affecting supervisors which Congress added to the Act in 1947. Believing that supervisors were the arms of management, Congress sought to guarantee employers the undivided loyalty of their supervisors. Accordingly, it enacted not only Section 8(b)(1)(B) but also Section 2(3), which excluded supervisors as defined in Section 2(11) from the protection of the Act.

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Where, however, an employer does not require his supervisors to refrain from union membership or activity, Section 14(a) left supervisors free to become or remain union members. Where they are in the union, subjecting them to union discipline for the performance of their supervisory or management functions, tends to create the very conflict-of-loyalty problem which Congress sought to avoid. The Board's conclusion that Section 8(b)(1)(B) proscribes such discipline avoids this impairment of Congress' objective. Neither the legislative history of Section 14(a) nor practical considerations support the view of the court below that Congress merely intended to afford the employer the option of either permitting his supervisors to become or remain union members, or requiring that they forego union membership.

C. The Board's construction of Section 8(b)(1)(B) also accords with the language of that provision. An employer is likely to be "restrained or coerced" in the "selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" if union pressures on the representatives he has selected give him cause to fear that they cannot be relied on to represent his interests faithfully.

Contrary to the view of the court below, an employer might well have cause to fear this outcome even when the action for which his representatives have been disciplined is the performance of rank-and-file work during an economic strike. There is no clear dividing line between such work and other, more usual, supervisory functions. First, maintaining pro-

duction during a strike may be an essential part of management's effort to strengthen its hand at the bargaining table—an effort in which it would naturally expect the assistance of all members of the management team. Second, the question of who is to perform rank-and-file work, and under what conditions, frequently arises in the course of administering collective bargaining agreements. Accordingly, a supervisor who has felt the union's lash for doing rank-and-file work during a strike may be unlikely to isolate that experience, and thus would be hesitant about offending the union, when confronted with future conflicts between the desires of the union and those of the employer.

D. Construing Section 8(b)(1)(B) to bar union discipline of supervisor-members for performing rank-and-file work during a strike constitutes a fair and reasonable accommodation of the interests involved. It protects the employer's interest in being able to rely on the loyalty of the representatives he has selected for the purposes of collective bargaining and grievance adjustment. It protects supervisors from being forced to choose between equally damaging courses of action—on the one hand, respecting their employer's wishes and risking heavy penalties threatened by their union, and, on the other, obeying the union's order not to aid the employer and risking discharge or other adverse action by the employer. Finally, the Board's construction of Section 8(b)(1)(B) does not impair any vital interest of the union. Supervisory personnel have traditionally been allies

of management rather than of unions during strikes, and the union retains the power to discipline its ordinary rank-and-file members.

E. *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, does not undermine the Board's position here. The issue in that case was whether union fines imposed on *employee*-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A), a provision which protects entirely different interests from those protected by Section 8(b)(1)(B). A union may, of course, enforce against its members "a properly adopted rule which reflects a legitimate union interest, [and] impairs no policy Congress has embedded in the labor laws." *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 430, explaining *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418. Permitting union discipline in the present cases would frustrate the congressional policy of assuring employers the undivided loyalty of their supervisors.

II

On the record before it in the present cases, the Board properly concluded that the unions violated Section 8(b)(1)(B) of the Act. All of the supervisors involved had collective bargaining or grievance adjustment authority. In *Illinois Bell*, the employer made clear its wish that its supervisors help keep operations going during the strike, although it promised it would take no action against those who declined to work. In *Florida Power*, no such promise

was made. In both cases, the unions heavily penalized those supervisors who aided the employer by performing struck work. Whether the discipline took the form of fines or of expulsion from the union with concommitant loss of pension or other accumulated benefits, the Board was reasonable in concluding that it would be likely to have a deterrent effect with respect to future supervisory decisions on matters where there was a clash of union and management views.

ARGUMENT

I

THE BOARD PROPERLY CONCLUDED THAT A UNION VIOLATES SECTION 8(b)(1)(B) OF THE ACT BY DISCIPLINING A SUPERVISOR-MEMBER WHO POSSESSES COLLECTIVE BARGAINING AND GRIEVANCE ADJUSTMENT RESPONSIBILITIES FOR PERFORMING RANK-AND-FILE WORK DURING A STRIKE

A. INTRODUCTION

Section 8(b)(1)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Board has construed this provision to bar not only direct union pressure upon an employer to replace his chosen collective bargaining or grievance adjustment representative, but also the indirect pressure which results from union discipline of a supervisor with collective bargaining or grievance adjustment responsibilities, who is a union member, for the manner in which he

has performed not only those duties, but also his other lawful functions as a management representative (hereafter "supervisory or management functions").[13] Moreover, the Board has concluded that the performance during a strike of rank-and-file work is such a function.

We shall now show below (1) that the Board's interpretation of Section 8(b)(1)(B) is the result of an evolutionary process based upon the Board's experience with variant situations;[14] (2) that the interpretation harmonizes Section 8(b)(1)(B) with other provisions of the Act respecting supervisors; and (3) that the interpretation is consistent with the language of Section 8(b)(1)(B). We further show that the Board was reasonable in concluding that a supervisor's performance of rank-and-file work during a strike is a supervisory or management function.

B. THE EVOLUTION OF THE BOARD'S INTERPRETATION OF SECTION 8(b)(1)(B)

Most of the early cases in which the Board found violations of Section 8(b)(1)(B) involved direct union pressure to force the employer either to replace

[13] Since the supervisors in the present cases possessed grievance adjustment or collective bargaining responsibilities (*infra*, pp. 46–48), there is no occasion for the Court to consider whether Section 8(b)(1)(B) would proscribe union discipline of a supervisor who did not actually possess, but potentially could be assigned, those duties. See *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *National Labor Relations Board*, 84 LRRM 2896 (C.A. 3), decided November 30, 1973, remanding 196 NLRB 1121.

[14] Cf. *Local 761, I.U.E.* v. *National Labor Relations Board*, 366 U.S. 667, 674.

a collective bargaining or grievance adjustment representative whom the union found objectionable, or to hire foremen from the ranks of union members only.[15] Thus, in *Los Angeles Cloak Joint Board (Helen Rose Co., Inc.)*, 127 NLRB 1543, the Board held it to be a violation of Section 8(b)(1)(B) for a union to picket a company with the object of forcing it to dismiss its industrial relations consultant.[16] In *Baltimore Typographical Union No. 12 (Graphic Arts League)*, 87 NLRB 1215, the Board found a Section 8(b)(1)(B) violation where the union had sought, by threatening strike action, to compel the employer to accede to its demand for a contract clause providing that all composing-room foremen be chosen from among union members only, and that the foremen "continue to be cloaked with broad managerial powers, including the power of adjusting grievances" (*id.* at 1218).[17] It was immaterial, the Board ruled, that the employer "did not affirmatively resist the foreman demands," for a

[15] Other cases concerned union pressure on employers to join or resign from multi-employer bargaining associations. See, *e.g.*, *General Teamsters Local Union No. 324 (Cascade Employers Ass'n)*, 127 NLRB 488.

[16] See also *Local 986, Miscellaneous Warehousemen, Drivers and Helpers (Tak-Trak, Inc.)*, 145 NLRB 1511; *Southern California Pipe Trades District Council No. 16 (Paddock Pools of California, Inc.)*, 120 NLRB 249.

[17] See also *Portland Stereotypers and Electrotypers' Union No. 48 (Journal Publishing Co.)*, 137 NLRB 782, 787; *International Typographical Union (Haverhill Gazette Co.)*, 123 NLRB 806, 827, enforced, 278 F. 2d 6, 11–12 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705, 707; *International Typographical Union (American Newspaper Publishers Ass'n)*, 86 NLRB 951, 957, enforced, *A.N.P.A.* v. *National Labor Relations Board*, 193 F. 2d 782, 805 (C.A. 7).

Section 8(b)(1)(B) violation does not depend on "the actual effect of the coercive tactics in a particular case" (*id.* at 1218, n. 10).

In *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB 2173, decided in 1968, the Board, for the first time, was presented with a less direct form of union coercion of the employer's selection of his representatives for grievance adjustment or collective bargaining purposes. There, three foremen, who were union members, incurred the union's displeasure because they had permitted work to be performed in a manner contrary to the collective agreement as interpreted by the union. The three foremen were summoned to appear before the union's executive committee, and, after they failed to do so, the union fined them. Despite the absence of coercion aimed directly at securing replacement of the foremen, the Board held that the union had violated Section 8(b)(1)(B) of the Act.

> We find * * * that Respondent's actions, including the citations, fines, and threats of citation, were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct

means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them. In all the circumstances, therefore, we find that Respondent's acts constitute restraint and coercion of the Charging Party in the selection of its representatives within the meaning of Section 8(b)(1)(B) of the Act. [172 NLRB at 2173.]

The rationale of *San Francisco Mailers* was applied in *Toledo Locals Nos. 15-P and 272, Lithographers & Photoengravers Int'l Union (Toledo Blade Co.)*, 175 NLRB 1072. There, two supervisors were disciplined by their union for alleged contract violations committed while other employees in the plant, represented by another union, were on strike—*i.e.*, working in less than the minimum crew of four prescribed by the contract, and, in the case of one supervisor, doing nonsupervisory, production work in excess of the amount permitted by the contract. Although the union disciplined the supervisors for acts contrary to the union's interpretation of the contract, the Trial Examiner, whose decision the Board adopted, placed his holding that the discipline violated Section 8(b)(1)(B) on broader ground.

> The Board's decision in the *San Francisco Mailers* case, underscores the apparent import of Section 8(b)(1)(B) as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers. As the Board

> held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employer of the undivided loyalty of the supervisor to which it is entitled. If, therefore, the supervisor has actually been designated as the employer's bargaining or grievance representative (as the Board and the Trial Examiner found in the *San Francisco Mailers'* case, and I have also found in the present case), the Unions' discipline of the supervisor is unquestionably a restraint upon, and coercion of the employer's continuing its selection of, and reliance upon, the supervisor as its bargaining and grievance representative and an unfair labor practice within the meaning of Section 8(b)(1)(B) of the Act. * * * [175 NLRB at 1080–1081.]

The Sixth Circuit, in sustaining the Board's decision in *Toledo Blade,* stated:

> This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the Toledo Blade, and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would

thereby be impaired. [*National Labor Relations Board* v. *Toledo Locals Nos. 15–P and 272*, 437 F. 2d 55, 57.]

In *New Mexico District Council of Carpenters* (*A. S. Horner, Inc.*), 176 NLRB 797 (*Horner I*), the Board held that Section 8(b)(1)(B) barred union discipline of a supervisor for actions unconnected with either grievance adjustment or contract interpretation. The supervisor (Wilson) was disciplined by the union for hiring non-union carpenters (even though the collective bargaining agreement had no provision obligating the company to hire from a union hiring hall), and for signing a letter sent out by the company president asking the employees to vote against the union in a representation election. The Board, in finding a violation of Section 8(b)(1)(B), reasoned as follows:

> By preferring the charges and imposing a fine upon Wilson, Respondents were attempting to force the Company to change its selected representative for the purposes of collective bargaining and the adjustment of grievances from a representative of management's viewpoint to a person subservient to the will of Respondents. The Council itself explained it was fining or bringing charges against Wilson because he placed the Company's interests above those of Respondents. [Union official] Sizemore in his letter to the General Executive Board of the United Brotherhood stated that Superintendent Wilson's loyalty "must be to the Union." It is clear that Respondents preferred charges against and fined Wilson as a means of dis-

> ciplining him because he placed the interests of the Company above those of Respondents. This was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to Respondents. That the Company and Respondents had no labor agreement does not detract from this finding. Wilson could and did adjust grievances. * * * [176 NLRB at 798.] [18]

Similarly, in *Meat Cutters Union Local 81* (*Safeway Stores*), 185 NLRB 884, the Board found that the union violated Section 8(b)(1)(B) by fining and expelling from membership a supervisor (Hall) because, pursuant to company instructions, he had ordered processed meat from the company's warehouse instead of having the processing performed by store employees. The Board found that the discipline was imposed "not on the ground that Hall violated the [collective bargaining] contract, but that he had 'violated a duly-adopted union policy directed at the

[18] In *New Mexico District Council of Carpenters* (*A.S. Horner, Inc.*), 177 NLRB 500 (*Horner II*), involving the same union and the same company, the Board found a violation of Section 8(b)(1)(B) arising from the union's imposition of a fine on a supervisor for taking a job with the company without first securing clearance from the union as its rules required. The Board found that such clearance would not have been forthcoming because the company did not recognize the union, and that the union was "using its internal working rules to boycott an employer" who had no contract with it (*id.* at 502). The Board's orders in the two *Horner* cases were enforced by the Tenth Circuit. *National Labor Relations Board* v. *New Mexico District Council of Carpenters*, 454 F. 2d 1116.

preservation of bargaining-unit work' " (*id.* at 887). The District of Columbia Circuit enforced the Board's order, stating:

> The Union in the instant case fined and expelled Supervisor Hall in retaliation for his performance of duties indigenous to his position as a management representative. [Footnote omitted.] * * * Had Hall, as supervisor, refused to carry out these orders as directed by his Employer, he certainly would have been subject to Company discipline, and there would have been serious doubt thereafter as to whether he could represent the Company in a ***bona fide*** manner against the Union in other matters where their interests were adverse. Under these circumstances, it is obvious that the Union's actions were impermissibly designed "to change [the Company's] representative from one representing the viewpoint of management to a person responsive or subservient to the Union's viewpoint * * *." *N.L.R.B.* v. *Sheet Metal Workers, Local 49*, 430 F. 2d 1348, 1350 (10th Cir. 1970). [*Meat Cutters Union Local 81* v. *National Labor Relations Board*, 458 F. 2d 794, 798–799.] [19]

In sum, prior to its decisions in the present cases, the Board had concluded that Section 8(b)(1)(B) proscribed not only direct union pressure on an em-

[19] See also *San Francisco Typographical Union No. 21 (California Newspapers)*, 192 NLRB 523, 525 (union violated Section 8(b)(1)(B) by fining a supervisor for discharging an employee for taking the afternoon off without permission). The Ninth Circuit sustained the Board's ruling, although it declined to sustain its further finding that the union's discipline of supervisors for working during a strike also violated Section 8(b)(1)(B). *National Labor Relations Board* v. *San Francisco Typographical Union No. 21*, 486 F. 2d 1347, 1349, pending on petitions for certiorari, Nos. 73–1024 and 73–1199.

ployer to remove a supervisor with grievance adjustment or collective bargaining functions whom the union disfavored, but also the union restraint of an employer which flows from attempting, through union discipline of such supervisors who are union members, to dictate the way in which they would perform their supervisory or management functions.[20] Contrary to the view of the court below (*Florida Power,* Pet. App. A, pp. 28–29), the Board did not adopt a new policy, but simply applied the interpretation which had evolved in its past cases in concluding, in *Illinois Bell* and *Florida Power,* that the union discipline imposed on the supervisors for performing duties which management properly expected of them during a strike violated Section 8(b)(1)(B) of the Act.[21] As we shall

[20] However, in *Local 453, Brotherhood of Painters (Syd Gough & Sons, Inc.)*, 183 NLRB No. 24, 74 LRRM 1539, the Board indicated that its broad interpretation of Section 8(b)(1)(B) did not amount to a *per se* rule which would proscribe union discipline of a Section 8(b)(1)(B) representative for any reason. In that case, a supervisor-member who was working at a site struck by a sister local was fined by his union for violating its rule which required members to register with a sister local before accepting work at any site within the latter's geographic jurisdiction. The Board dismissed the Section 8(b)(1)(B) complaint, holding that the registration rule existed to facilitate administration of the hiring hall, and was unrelated to any dispute between union and management in which the employer was entitled to rely on the loyalty of his supervisors.

[21] In both decisions, the Board relied on its decision in *Wisconsin Electric*, 192 NLRB 77, which presented the same issue concerning union discipline of supervisors for performing rank-and-file struck work. In *Wisconsin Electric*, the Board cited the entire line of cases beginning with *San Francisco-Oakland Mailers, supra,* with special emphasis on *Toledo Blade, supra,* noting that the principles it was applying to the facts before it were "long-settled and court approved" (192 NLRB at 78, A. 198.)

now show, the Board's decisions in the present cases are consistent not only with its reasoning in *San Francisco Mailers* and its progeny, but also with the legislative history of Section 8(b)(1)(B).

C. THE BOARD'S INTERPRETATION HARMONIZES SECTION 8(b)(1)(B) WITH OTHER PROVISIONS OF THE ACT RESPECTING SUPERVISORS

The legislative history of Section 8(b)(1)(B), which was added to the Act in 1947, shows Congress' concern with union attempts to compel replacement of over-strict foremen and to force companies into industry-wide bargaining.[22] Moreover, in the 1947 amendments to the Act, Congress went beyond Section 8(b)(1)(B) in legislating on the subject of supervisory employees. It also enacted Section 2(3), which excluded supervisors (as defined in Section 2(11)) from the "employee" category—thereby removing supervisors from the protection of the Act; and it enacted Section 14(a), which provides that, while the Act does not prohibit supervisors from becoming or remaining union members, employers are not required to bargain collectively respecting them.[23] All of these provisions appeared in the original text of S. 1126 as reported by the Senate Committee on Labor and Public Welfare,[24] and S. 1126 with certain amendments

[22] See, *e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 21, I Legislative History of the Labor-Management Relations Act, 1947 (GPO, 1948) (hereafter Leg. Hist.) 427; 93 Cong. Rec. 3838 (remarks of Senator Taft), II Leg. Hist. 1012; 93 Cong. Rec. 4143 (remarks of Senator Ellender), II Leg. Hist. 1077.

[23] See text of these provisions, *supra*, pp. 2–3.

[24] I Leg. Hist. 102–103, 112, 136. Since all of these provisions, including Section 8(b)(1)(B), were in S. 1126 from the start,

not material here, was the bill finally enacted into law. Accordingly, the Board was reasonable in treating the provisions respecting supervisory employees as reflecting a congressional policy as to supervisors, and in interpreting Section 8(b)(1)(B) so as to accommodate the policy considerations which underlay the other changes which the 1947 Act made with regard to supervisory employees. Cf. *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 428–429.

In legislating on the subject of supervisors, Congress was in large part reacting to this Court's decision in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, which upheld a Board determination that foremen were "employees" under the Wagner Act, 49 Stat. 449, and constituted an appropriate unit for collective bargaining purposes.[25] Just as the dissenters in *Packard* had viewed foremen as constituting "the arms and legs of management in executing labor policies" (330 U.S. at 496), so those in Congress who favored passage of the 1947 amendments believed, in the words of Senator Taft, that

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it is of little relevance that the Case bill, passed in a previous session of Congress and vetoed by President Truman, contained only the antecedents of Sections 2(3) and 14(a) (see *Florida Power*, Pet. App. A, p. 44, n. 25). As Senator Taft explained, "the Case bill * * * was only a partial approach to the problem" of the injustices created by the Wagner Act. 93 Cong. Rec. 3835, II Leg. Hist. 1006.

[25] For references to the *Packard* case, see, *e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 4, I Leg. Hist. 410; 93 Cong. Rec. A–2252 (remarks of Senator Ball), II Leg. Hist. 1523–1524; 93 Cong. Rec. 4136 (remarks of Senator Ellender), II Leg. Hist. 1064.

"[f]oremen are part of management." [26] Because foremen—and supervisors generally—played such a key role in the dealings between management and its rank-and-file employees, it was essential, the Senate Report on S. 1126 stated, that employers be assured of the "undivided loyalty" of their supervisors.[27]

Under the Wagner Act and the *Packard* decision, employers lacked this assurance. Management was compelled to bargain with its supervisory personnel in labor organizations "composed of or subservient to the unions of the very men they were hired to supervise," [28] and there were no protections against a union's use of its power to subvert the proper exercise of supervisory authority. As a result, the Senate Report noted, in the mines of the Jones & Laughlin Steel Corporation, where the United Mine Workers had organized the supervisory employees: "Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled." [29] As the House Report put it, unionization of supervisors had led to a situation in which the supervisors "are subject to influence and control by the rank and file

[26] 93 Cong. Rec. 3836, II Leg. Hist. 1008. See also 93 Cong. Rec. 5014 (remarks of Senator Ball), II Leg. Hist. 1496.

[27] S. Rep. No. 105, 80th Cong., 1st Sess. 5, I Leg. Hist. 411.

[28] *Id.* at 3, I Leg. Hist. 409.

[29] *Id.* at 4, I Leg. Hist. 410, citing the testimony of H. Parker Sharp in Hearings before the Senate Committee on Labor and Pubilc Welfare on S. 55 and S.J. Res. 22, 80th Cong., 1st Sess., pt. 1, 339.

union, and instead of their bossing the rank and file, the rank and file bosses them." [30]

To deal with this problem, Congress excluded true supervisors (those defined in Section 2(11)) from the definition of "employee" (Section 2(3)) and hence from the protection of the Act. This relieved the employer of the obligation, imposed by *Packard,* to bargain collectively with a union representing his supervisors. It also permitted the employer to insist, on pain of discharge, that his supervisors refrain from union membership or activity,[31] although, absent such employer insistence, Section 14(a) left supervisors free to become or remain union members.

Where supervisors were union members, however, subjecting them to union discipline for the performance of their supervisory or management functions tends, as shown (pp. 18–27), to create the very conflict-of-loyalty problem which Congress sought to avoid."[32]

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[30] H. Rep. No. 245, 80th Cong., 1st Sess. 14, I Leg. Hist. 305.

[31] See *National Labor Relations Board* v. *Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908.

[32] The Board's decision in *Nassau & Suffolk Contractors' Ass'n*, 118 NLRB 174, cited by the court below (*Florida Power*, Pet. App. A, p. 43), is not inconsistent with this view. Although the Board there stated that two "master mechanics" with supervisory status owed "allegiance at least as much to the Union as to their employers" (118 NLRB at 182), this was in the context of concluding that the respondent-employer association had not dominated the union merely by permitting the master mechanics to participate actively in union affairs. The Board was not considering whether union discipline of a management representative would tend to create divided loyalty and thus violate Section 8(b)(1)(B). The master mechanics were not management representatives for grievance

The Board's conclusion that Section 8(b)(1)(B) proscribes such discipline effectuates Congress dominant objective of insuring the employer the undivided loyalty of his supervisors.

The court below concluded that the first portion of Section 14(a)—providing that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"—shows that Congress merely intended to afford the employer the option of either permitting his supervisors to become or remain union members, or requiring that they forego union membership; *i.e.*, "once an employer permits his supervisors to join unions or agrees to engage in collective bargaining with unionized supervisors, he no longer can claim their undivided loyalty in every employer-union dispute except to the extent that the collective bargaining agreement ensures such loyalty" (*Florida Power,* Pet. App. A, p. 42). But the "first part of [Section 14(a)] was included presumably out of an abundance of caution," for there was "nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, I Leg. Hist. 564.[33] The remaining part of the provision merely

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adjustment or collective bargaining purposes like the supervisors in the present cases. The Board found that they served as "the Union's job stewards" and were "the representatives of the Union and of the Union's members on the job," holding their positions as master mechanics "only with the approval of the Union" (118 NLRB at 185).

[33] See also S. Min. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 39, I Leg. Hist. 501 ("[t]he beguiling statement of principle in

makes "clear that an employer could not be compelled to treat his supervisors like other statutory 'employees', even if they remained in the union" (*Florida Power*, Pet. App. A, p. 68). In sum, as the dissenting judges below properly concluded: "There is just nothing in the legislative history to indicate that Congress assumed that if an employer permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty" (*ibid.*).[34]

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section 14 that recognizes [the supervisors'] natural right to self-organization * * * is made meaningless by the removal of the legal sanctions that give vitality and substance to that right").

[34] That Congress could not have intended to place the employer in this position is confirmed by these considerations: Although the employer has a statutory right to hire only nonunion supervisors, this option has practical limits. The union will generally desire to have supervisors as members and thus will resist any attempt by the employer to restrict supervisors' membership. And even though a union may not lawfully insist that supervisors be members, the matter is a permissible subject for bargaining. Thus, the union can seek to achieve that result by demanding major concessions on wages or other mandatory bargaining items, in exchange for union agreement to nonunion supervisors. Moreover, the cost of management's insistence on nonunion supervisors may be further increased by the need to compensate such personnel for the forfeiture of accumulated union benefits upon termination of union membership (see n. 41, *infra*), or for forfeiture of the right to return to the bargaining unit with accrued seniority where the union refuses to accord that right to supervisors.

The documents set forth at notes 4 and 9, *supra*, show that the employers have had no intention of waiving their right to the undivided loyalty of the supervisors whom they permitted to retain union membership.

D. THE BOARD'S INTERPRETATION OF SECTION 8(b)(1)(B) ACCORDS WITH THE LANGUAGE OF THAT PROVISION

The Board's view that Section 8(b)(1)(B) bars union discipline of a supervisor-member who has collective bargaining or grievance adjustment responsibilities for the performance of any of his lawful supervisory or management duties accords with the language of that provision. The phrase restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" need not be read as referring only to a situation where the union's immediate object is to force a change in the identity of the employer's representative for those matters. It may properly be read as also encompassing situations where the union's action is likely to deprive the employer of the undivided loyalty of the representative whom he has selected for grievance adjustment or collective bargaining purposes.

Union discipline of supervisory personnel for the performance of supervisory or management functions restrains or coerces an employer "in the selection of his representatives" because it compels an employer to select as supervisors either persons who are not members of the union, or union members who, because of the threat of union discipline, may not give the employer their full loyalty at a time when he needs it most. Thus, to insure that supervisors would not be

subject to the divided loyalty which such discipline would create, an employer must either choose persons who are not members of the union, or, if supervisors are promoted from the ranks of the unionized employees, an employer must insist that such persons withdraw from the union. Where circumstances do not permit the employer to insist that supervisors withdraw from union membership, an employer would be required to select or retain supervisors whose loyalty would necessarily be affected by their subjection to union discipline.

As the court below recognized (*Florida Power* Pet. App. A, p. 18): "Where a supervisor is disciplined for the manner in which he performed his collective bargaining and grievance adjustment functions, the discipline's likely effect is to change the manner in which the supervisor performs those functions in the future. Discipline therefore achieves by indirect means what Section 8(b)(1)(B) clearly was intended to prevent."

Similarly, where a supervisor is disciplined by the union for performing other supervisory or management functions, the likely effect of such discipline is to make him subservient to the union's wishes when he performs those functions in the future. Thus, even if the effect of this discipline did not carry over to the performance of the supervisor's grievance adjustment or collective bargaining functions, the result would be to deprive the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes.

For, it would not be practical for the employer to restructure the supervisor's job so as to confine him to the latter functions.

Moreover, the employer could reasonably conclude that such discipline would also tend to make the supervisor responsive to the union's wishes in the performance of his grievance adjustment or collective bargaining functions. For, a supervisor who has once felt the union's lash for performing a supervisory function contrary to the union's wishes is unlikely to make subtle distinctions when the union seeks to interfere in the performance of grievance adjustment or collective bargaining functions; rather, it is more likely that he will only remember that he was disciplined for defying the union, and will seek to avoid a repetition of that punishment by acceding to the union's current demands.[35]

[35] This danger is enhanced by the fact that the line between grievance adjustment or collective bargaining functions and other supervisory functions is not clear-cut. Thus, in *Horner I*, *supra*, the disciplined supervisor, *inter alia*, co-signed a letter urging the employees to vote against the union in an upcoming representation election. The court below, although there was no collective bargaining agreement in existence, stated: "Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members" (*Florida Power* Pet. App. A, pp. 19–20, n. 18). And, explaining *Meat Cutters*, *supra*, where the Board found unlawful union discipline of a supervisor-member for violating a union policy with respect to meat procurement, the court stated: "The discipline * * * was not totally unrelated to the performance of grievance settlement functions since by fining the supervisor the union was avoiding and undercutting a clause in the contract that provided that all matters pertaining to the proper application of the agreement shall be handled by certain grievance-arbitration procedures spelled out in the agreement" (*id.* at 27).

E. THE BOARD WAS REASONABLE IN CONCLUDING THAT A UNION SHOULD NOT BE PERMITTED TO DISCIPLINE A SUPERVISOR-MEMBER FOR THE PERFORMANCE OF RANK-AND-FILE WORK DURING A STRIKE

1. The performance of rank-and-file work during a strike is a supervisory or management function

The court below concluded that the analysis set forth above (pp. 33–35) cannot be applied where the supervisor is disciplined for performing rank-and-file work during a strike. The court reasoned: "when a supervisor foresakes his supervisory role to do rank-and-file work ordinaily the domain of nonsupervisory employees, he is no longer acting as a management representative"; the "dividing line between supervisory and nonsupervisory work * * * is sharply defined and easily understood"; there is "accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties" (*Florida Power* Pet. App. A, pp. 24–25). This reasoning does not withstand scrutiny.

As the dissenting Judges below observed, the majority opinion reflects an "unrealistic" view of "the role of a strike in the collective bargaining process" (*Florida Power* Pet. App. A, p. 61) in asserting that a supervisor performing rank-and-file work during a strike "is no longer acting as a management representative." This Court has emphasized that "the use of economic pressure by the parties to a labor dispute

is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." *National Labor Relations Board* v. *Insurance Agents' International Union,* 361 U.S. 477, 495. Just as a union seeks to strengthen its hand at the bargaining table by bringing the company's operations to a costly halt, so management, in order to hold out for the terms it wants, seeks to counter this pressure by keeping operations going. The performance of rank-and-file work during the strike by supervisors and other management representatives is a vital part of such a company effort.

As the Seventh Circuit stated in *Local 2150, I.B.E.W.* (*Wisconsin Electric*), *supra:*

> What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. But it can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to combating a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" * * * relied upon supervisors, where practicable, to pitch in and perform rank-and-file work in an attempt both to strengthen its

> bargaining position and to preserve the enterprise from collapse during an adverse economic repercussion following a strike. Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. * * * [*Florida Power,* Pet. App. D, pp. 113–114, 486 F. 2d 602, 608.]

Moreover, contrary to the assumption of the court below, the "dividing line between supervisory and nonsupervisory work" is not "sharply defined and easily understood." Many of the day-to-day problems handled by supervisors involve the question of who is to perform rank-and-file work. The collective bargaining agreement may allow supervisors to perform a given maximum percentage of rank-and-file work,[36] or it may establish some leeway for occasions when supervisors are demonstrating work methods to new employees, correcting faulty work, or making emergency repairs.[37] During a strike, supervisory and rank-

[36] In *Toledo Blade*, *supra*, one of the supervisors was disciplined for performing rank-and-file work in excess of the 20 percent maximum allowed by the contract—during a strike called at the plant by another union (175 NLRB at 1074).

[37] In *San Francisco Mailers*, *supra*, one of the issues was whether the foreman could do journeyman's work after his regular shift under an "emergency repair" provision of the contract (172 NLRB at 2177).

Cf. *Sheet Metal Workers Local 49 (General Metal Products, Inc.)*, 178 NLRB 139, enforced, 430 F. 2d 1348 (C.A. 10) (foreman disciplined for performing, with the help of two higher-ranking supervisors, "journeyman's work"—hoisting—

and-file work is even more apt to be commingled.[38] Hence, if a supervisor has been disciplined by the union for performing rank-and-file work during a strike, the supervisor would be unlikely to segregate that experience when confronted after the strike with other conflicts between the desires of the union and those of the employer.

In any event, the questions whether a supervisor would be likely to differentiate between union discipline imposed for performing rank-and-file struck work and that imposed for the performance of his other functions, and whether the employer could reasonably conclude that he would not, are to be determined by the Board on the basis of its specialized experience. Its determination is not "to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment" (*Florida Power Pet.* App. A, p. 62, dissenting opinion). See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 48–49, 51.

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before the start of the regular working day; held that the foreman was engaged in "the supervisory act of directing when, where and by whom the hoisting would be done," 430 F. 2d at 1349).

[38] Thus, in *San Francisco Typographical Union*, *supra*, the supervisors who were fined performed both supervisory and rank-and-file work (Pet. App. in No. 73–1024, p. 56). Similarly, in *Florida Power*, some of the supervisors who were disciplined apparently performed both supervisory and rank-and-file work; only those who merely performed their normal supervisory duties were exempt from discipline. (*Florida Power* Pet. App. A, p. 9, n. 13; Pet. App. B, p. 81).

2. Construing (8)(b)(1)(B) to bar discipline of supervisor-members for performing rank-and-file work during a strike constitutes a fair and reasonable accommodation of the interests involved

The question, then, is not whether supervisors performing rank-and-file work during a strike are acting as management representatives, but whether the Board made a fair and reasonable accommodation of the various interests involved in concluding that management's claim to the loyalties of supervisors who are union members is superior to the claim of the union. We shall show that it did.

As outlined above (pp. 27–32), the legislative history of the 1947 amendments affecting supervisors evinces a congressional purpose to protect the employer's interest in securing and retaining the loyalties of his supervisors. Such protection would, of course, be especially vital during a strike, and Congress so recognized.[39] By insulating the supervisor-member from union discipline for assisting the employer during a strike, the Board's interpretation of Section 8(b)(1)(B) helps assure the employer of the supervisors' undivided loyalty at that time. In sum, as the dissenting Judges below properly concluded (*Florida Power* Pet. App. A, p. 63):

> When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control

[39] See H. Rep. No. 245, *supra*, 15–16, I Leg. Hist. 306–307; S. Rep. No. 105, *supra*, 5, I Leg. Hist. 411; 93 Cong. Rec. 4137 (remarks of Senator Ellender), II Leg. Hist. 1065.

> over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties. * * * [Emphasis in original.]

The Board's interpretation also takes into account the legitimate interests of supervisors. Although the protections of the Act are not extended to supervisors as such, it is both unfair and unwise as a matter of policy to force a supervisor, as the court below would, to choose between equally damaging courses of action. To require a supervisor to leave the union to escape union discipline for honoring the employer's wish that he assist the employer during a strike, imposes a heavy penalty on him in terms of loss of union benefits.[40] On the other hand, should the supervisor decide to maintain his union ties and stay away from work in obedience to the union's order, he, unlike the ordinary employee who elects to remain out on strike, is subject to discharge by the employer. See *Texas Co.* v. *National Labor Relations Board,* 198 F. 2d 540 (C.A.

[40] In the utility, printing, construction, and other industries where supervisors are selected from the ranks of employee union members and may return to those ranks, union membership is highly valuable to supervisors because they have substantial investments in union pension and welfare plans and death benefits (as was true in the present cases), and, through the union travel card, they have employment protection in the event of economic or seasonal fluctuations. See The Executive Council, ITU, "Facts About the International Typographical Union," 35–38 (1953); Summers, "Disciplinary Procedures of Unions," 4 Ind. and Lab. Rels. Rev. 15, 26–29 (1950).

9). To avoid this onerous choice between displeasing his union and risking substantial penalties, or displeasing his employer and risking discharge, it is likely that rank-and-file employees would be reluctant to accept promotion to supervisory positions, thereby impairing the congressional policy favoring "upward mobility in the labor market," referred to in the concurring opinion below (*Florida Power* Pet. App. A, p. 57).[41]

To be sure, the strike "is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is

[41] The opinions below suggest (*Florida Power* Pet. App. A. pp. 49–50, 54) that the employer could mitigate the hardship by agreeing to compensate the supervisors for any benefits which they might lose by resigning from the union. However, many employers may not have pension plans for management personnel, and providing such benefits only for the class of supervisors promoted into management from the bargaining unit would present a formidable problem. See N. Levin, *Labor-Management Benefit Funds* 239 (1971). Where pension funds for management personnel do exist, it is rare to find arrangements for reciprocity between those funds and the funds for the rank-and-file employees; so it is unlikely that the supervisors could have their benefits transferred from their old fund. *Id.* The cost to the management fund of compensating for the lost benefits, *i.e.*, of assuming what would amount to the "past service liability" of each of the new supervisors, would be considerable, even if the amount involved could be amortized over a number of years rather than paid in a lump sum. See Dept. of Social Security, AFL–CIO, *Pension Plans Under Collective Bargaining* (Pub. No. 132) 61–68. Moreover, where, as here, an employee who has been elevated to supervisor may return to rank-and-file status for a while and then move up again (see n. 40, *supra*), the employee would be reluctant to cut off his union benefits even though the employer has offered attractive substitute benefits.

essential if the union is to be an effective bargaining agent * * *.'" *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181. However, to deprive the union of the right to discipline strike-breaking supervisor-members does not impair the union's vital interest in maintaining solidarity during a strike to the same extent as would depriving it of the right, recognized in *Allis-Chalmers*, to discipline defecting employee-members. For, as shown (pp. 36-38), supervisory personnel have not traditionally been picket-lines allies of the rank-and-file; rather, as the *Packard* dissent noted, "[i]n industrial conflicts they were allied with management" (330 U.S. at 496). Thus, the union's inability to discipline supervisors for crossing the picket line to do rank-and-file work would not deprive it of its traditional support any more than does its inability to discipline company vice-presidents or other officials without union connections who might be called upon by the employer to keep operations going during a strike.

Nor does the Board's position necessarily result in supervisor-members receiving all of the benefits of union membership, without incurring any of its burdens. Thus, in *Florida Power*, the supervisors whose discipline is at issue were not members of the bargaining unit on strike and hence did not receive any enhanced contract benefits as a result of the strike. While many of the supervisors involved in *Illinois Bell* were members of the bargaining unit on strike, they did not receive the full contract benefits which the regular employees received; for, supervisors'

wages were not covered by the bargaining agreement (see *supra*, p. 5).[42]

In any event, nonunion employees in a bargaining unit represented by a union are not denied the benefits of any contract negotiated by the union merely because they did not support the strike which gained the contract. Moreover, as shown (*supra*, pp. 9–10), some of the supervisors were not full-fledged members of the union, but held "withdrawal" cards which merely permitted them to continue their investments in certain benefit plans. Some supervisors who were full-fledged members still could take only a limited role in its affairs.[43]

In sum, balancing the injury to legitimate employer and supervisor interests from permitting the union to discipline supervisor-members for assisting the employer during an economic strike against the injury to legitimate union interests from denying such power to the union, the Board was reasonable in concluding

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[42] Local 134's attempt at the Board hearing to show that foremen's wages were pegged to the level of craftsmen's wages (A. 278–280) did not bear fruit. Charles Germain, the Company's staff supervisor in charge of wages and working conditions (A. 253), testified that, when a craftsman is first elevated to a foreman's position at the first supervisory level, his pay is increased by a fixed percentage of his current rate as a craftsman, but that subsequent raises and the pay of other previously promoted supervisors are unaffected by any change in craft wages (A. 279–280).

[43] See *Local 636, United Association of Journeymen* v. *National Labor Relations Board*, 287 F. 2d 354 (C.A.D.C.); *National Labor Relations Board* v. *Employing Bricklayers' Association*, 292 F. 2d 627 (C.A. 3); *National Labor Relations Board* v. *International Typographical Union*, 452 F. 2d 976, 979–980 (C.A. 10).

that the employer and supervisor interests should prevail. Accordingly, the Board's "balance" is entitled to stand. See *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 96.

A contrary conclusion is not required by *Allis-Chalmers, supra*. The issue there was whether union fines against *employee*-members for strikebreaking constituted an unfair labor practice under Section 8 (b)(1)(A) of the Act as a restraint or coercion of those *employees* in the exercise of their Section 7 right to refrain from concerted activities. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint of the *employer* in his right to select and retain loyal representatives. "Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter." *Local 2150, IBEW (Wisconsin Electric), supra (Florida Power* Pet. App. D, p. 115, 486 F. 2d at 609).

More relevant to the problem here is *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418. The Court there held that the union violated Section 8(b)(1)(A) by disciplining an employee-member for filing an unfair labor practice charge against the union with the Board, without first exhausting his remedies within the union, as required by union rule. The Court held that

the rule was invalid as applied because it impaired the public interest in insuring "unimpeded access to the Board" (*id.* at 424–425). As the Court later explained, while the Act leaves a union free to enforce against employee-members "a properly adopted rule which reflects a legitimate union interest, [and] impairs no policy Congress has embedded in the labor laws," the union enjoys no right to enforce rules which are "contrary to the plain policy of the Act." *Scofield, supra,* 394 U.S. at 430. As shown (pp. 27–32), to permit a union to enforce against supervisor-members a rule barring them from performing rank-and-file work during a strike would frustrate the important policy, which Congress has incorporated in the Act, of assuring employers the undivided loyalty of their supervisors.

II

ON THE FACTS OF THE PRESENT CASES, THE BOARD PROPERLY CONCLUDED THAT THE UNIONS VIOLATED SECTION 8(b)(1)(B) OF THE ACT

A. In both *Illinois Bell* and *Florida Power,* the supervisors benefited by the Board orders were covered by Section 8(b)(1)(B) of the Act, *i.e.,* they were "representatives for the purposes of collective bargaining or the adjustment of grievances." The parties in *Florida Power* stipulated that the supervisors who were disciplined had authority to represent the employer in matters involving interpretation of the collective bargaining agreement and to adjust grievances (*Florida Power* Pet. App. B, p. 81; 14–15, 28, 38–39). In *Illinois Bell,* substantial evidence sup-

ports the Board's finding that the disciplined supervisors possessed grievance handling and contract administration authority.

Most of them held the position of either PBX Installation Foreman (also termed PBX Foreman) or Building Cable Foreman (A. 97–98). Both of these are first-level supervisory positions (A. 223–224), and Article XXVII in the relevant collective bargaining agreement, which sets forth a "Grievance and Conference Procedure," shows that first-level supervisors have the initial responsibility for handling the grievances of employees under them (A. 119–120). Moreover, the testimony of Edward Deady, a District Installation Superintendent who had worked as a PBX Foreman before being promoted to his present position, establishes that the practice of Illinois Bell substantially conformed to that contract provision (A. 237–238, 246–247)."

Deady further testified that "most grievances never get above the first step" (A. 247), that it was company policy to see that grievances were resolved there if possible, and that union stewards who tried to bypass that step were admonished (A. 248–249). Deady's testimony also shows that these supervisors had contract interpretation responsibilities, such as administering the overtime provisions of the bargaining agree-

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"Before the Board, the unions contended that the first-level supervisors were not Section 8(b)(1)(B) representatives because, although they did handle grievances, they lacked authority to make the final decision in the case of "serious grievances" (e.g. termination of an employee). Nothing in Section 8(b)(1)(B) or its legislative history warrants that distinction.

ment (A. 233–234, 248, 249). Finally, the record shows that the higher-level supervisors in *Illinois Bell*—District Installation Superintendents and General Foremen—had grievance adjustment or collective bargaining functions (A. 223, 250, 275), although they had less contact with rank-and-file employees than did first level supervisors (A. 245, 249).[45]

B. In both *Illinois Bell* and *Florida Power*, the company, a public utility, sought to keep operations going during an economic strike. In order to do so, it required the assistance of the above-described supervisors to perform work that the striking employees would otherwise have performed. Although the record in *Florida Power* does not reveal whether the company ordered the supervisors to report to work during the strike, it is reasonable to conclude that it expected them to do so. See *Local 2150, IBEW* (*Wisconsin Electric*), *supra* (*Florida Power* Pet. App. D, p. 106, n. 3, 486 F. 2d at 603 n. 3).

Moreover, while in *Illinois Bell* management officials told the supervisors that the company would neither require them to work nor penalize them if they failed to do so, it was clear, as one of the disciplined supervisors testified, that the company "would like to have us come back to work" (A. 272). The fact that the company expressed its wish in optional, rather than command, language can be explained

[45] The complaint in *Illinois Bell* included three Assistant Staff Supervisors and two Engineers among the disciplined supervisors (A. 97–98), but the Trial Examiner excluded them from his order, after finding that they had neither collective bargaining nor grievance adjustment functions (A. 180, 192).

on the ground that it realized that it could not find replacements for the supervisors if they refused to work and wished to avoid a "no-win" result should the supervisors decide to obey the union. Local 134 enhanced the prospect of such obedience by warning the supervisors that they would be subject to discipline if they performed rank-and-file work during the strike (*supra*, p. 6.)

In both cases, those supervisors who acceded to the employer's wishes and assisted him in keeping the plant running were subjected to substantial penalties by the unions. In *Illinois Bell*, the discipline took the form of fines of $500 for each supervisor (*supra*, p. 7);[46] in *Florida Power*, fines ranging up to $6,000 were imposed, and many supervisors were expelled from the union (*supra*, p. 10).[47] Penalties of this magnitude would be likely to deter the supervisors who incurred them[48] from assisting the employer in future strikes, thereby depriving him of services which he is entitled to expect will be performed by his management rep-

[46] In addition, fines of $1,000 each were imposed on five supervisors for forming the Bell Supervisors Protective Association (*supra*, p. 7, n. 6).

[47] The supervisors who were expelled lost the right to continue their participation in the System Council U–4 Death Benefit Fund, as well as the "continuous good standing" with the union which is a condition of eligibility for union pension benefits (*supra*, pp. 10–11).

[48] Although, in *Illinois Bell*, the supervisors who paid the fines were ultimately reimbursed by the company (A. 261–262, 267), they still had to pay them initially, and run the gauntlet of union disciplinary proceedings. At least one supervisor who did not pay the fine was sued therefor in the state court (A. 272–273).

resentatives. Moreover, it is also likely that the discipline would serve as an object lesson to other supervisors and deter them from rendering future strike assistance to the employer. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 275.

A different conclusion is not required by the observation of the court below (*Florida Power*, Pet. App. A p. 24) that "[o]ur everyday experience tells us that the result of discipline is normally some degree of hostility toward the person or group imposing the discipline"; and that "[t]his is even clearer when we look at expulsion as a disciplinary measure," for "[t]hose who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future." Even if discipline were to cause the member to dislike the union, it does not follow that the member would be willing to incur a repetition of that, or more severe, discipline by defying the union in the future. With respect to expulsion, the heavy loss of benefits which that penalty causes could well prompt some supervisors who were expelled to seek to regain the favor of the union so that the expulsion could be rescinded.[49] In any event, the expulsion would certainly have a deterrent effect on other supervisors in the future. See *Dallas Mailers Union, Local 143* (*Dow Jones Co.*) 181 NLRB 286, enforced, 445 F. 2d 730 (C.A.D.C.).

Finally, contrary to the court below (*Florida Power* Pet. App. A, pp. 23–24), the fact that Illinois Bell

[49] This motive would have been especially strong in the case of the one supervisor who was suspended from his local union for three years. That suspension was ultimately rescinded on appeal. (A. 32).

promoted some of the supervisors who, under threat of union discipline, refused to cross the picket line does not prove that it believed that the failure to work during the strike did not impair the supervisor's future reliability as a management representative.[50] The promotions took each of the supervisors in question out of a front-line position in which he would have substantial daily contact with rank-and-file members of Local 134.[51] Moreover, even though the company may have had doubts as to reliability of these supervisors, it could still have decided, on balance, to promote them, at least temporarily, to the new positions

[50] Whether conduct constitutes restraint and coercion within the meaning of Section 8(b)(1)(B) is to be determined by the likely effect of that conduct, and not by whether it succeeded in the particular case. See *A.N.P.A.* v. *National Labor Relations Board*, 193 F. 2d 782, 796, 805 (C.A. 7).

[51] Three PBX Foremen who obeyed the union's directive were later appointed to the position of General Foreman (A. 277), a position several steps up in the grievance-handling procedure (A. 275–276). Two other supervisors who respected the union's discipline threats and refused to work during the strike were appointed to the position of District Installation Superintendent (A. 288), a position in which the individual spends most of his time in the office and has significantly less contact with rank-and-file employees than do the first-level supervisors (A. 245–246).

The same pattern was followed with respect to the promotion of supervisors who worked during the strike and were disciplined therefor. One such supervisor (Farrell) was transferred to a position outside the jurisdiction of Local 134 (A. 262); another (Howe) was promoted to Assistant Staff Supervisor (A. 263), a position which the Board found entailed no collective bargaining or grievance adjustment functions; and a third (Hawkins) was promoted after the strike from Assistant Staff Supervisor to District Installation Superintendent, and ultimately transferred to a location outside of Local 134's jurisdiction (A. 271–272).

because they possessed special skills not possessed by other personnel currently employed.

In sum, on the facts of the present cases, the Board properly concluded that the unions violated Section 8(b)(1)(B) of the Act by disciplining supervisor-members for performing rank-and-file work during the strikes called by the unions.

CONCLUSION

The judgment of the court of appeals should be reversed and the cases should be remanded to that court with directions to enforce the Board's orders.

Respectfully submitted.

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